

## § 9901.808

under paragraph (g)(2)(ii) of this section, an employee or OPM may file a PFR with the full MSPB within 30 days in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(ii) The Board may dismiss any petition that, in the view of the Board, does not raise substantial questions of fact or law.

(iii) The full MSPB may order corrective action only if the Board determines that the decision was—

(A) Arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) Obtained without procedures required by law, rule, or regulation having been followed; or

(C) Unsupported by substantial evidence.

(iv) Upon receipt of a petition for full MSPB review or an RFR that becomes a PFR as a result of the expiration of the Department's review period in accordance with paragraph (g)(2)(i) of this section, the other party to the case and/or OPM, as applicable, will have 30 days to file a response to the petition. The full MSPB will act on a PFR within 90 days after receipt of a timely response, or the expiration of the response period, as applicable, in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(3) *Request for reconsideration of final MSPB decision.* The Director of OPM, after consultation with the Secretary, may seek reconsideration by MSPB of a final MSPB decision in accordance with 5 U.S.C. 7703(d), which is modified for this purpose. The Director of OPM must seek reconsideration within 35 days after the date of service of the Board's final order. If the Director seeks such reconsideration, the full MSPB must render its decision no later than 60 days after receipt of a response to OPM's petition in support of such reconsideration. The full MSPB must state the reasons for its decision.

(4) *Failure of MSPB to meet deadlines.* Failure of MSPB to meet the deadlines imposed by paragraphs (f)(1), (h)(2)(iv), and (h)(3) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party. If the AJ or full MSPB fails to meet the above time limits, the full MSPB will inform the

## 5 CFR Ch. XCIX (1–1–07 Edition)

Secretary in writing of the cause of the delay and will recommend future actions to remedy the problem.

(i) *Judicial review.* The Secretary or an employee adversely affected by a final order or decision of MSPB may seek judicial review under 5 U.S.C. 9902(h)(6).

### § 9901.808 Appeals of mandatory removal actions.

(a) Procedures for appeals of adverse actions to MSPB based on MROs will be the same as for other offenses except as otherwise provided by this section.

(b) If one or more MROs are sustained, the MSPB AJ may not mitigate the penalty.

(c) Only the Secretary may mitigate the penalty within the Department.

(d) If the MSPB AJ or the full MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, a subsequent proposed adverse action (other than an MRO) based in whole or in part on the same or similar evidence is not precluded.

### § 9901.809 Actions involving discrimination.

(a) In considering any appeal of an action filed under 5 U.S.C. 7702, the Board will apply the provisions of 5 U.S.C. 9902 and this part.

(b) In any appeal of an action filed under 5 U.S.C. 7702 that results in a final Department decision, if no petition for review of the Department's decision is filed with the full Board, and if requested by the appellant, the Department will refer only the discrimination issue to the full Board for adjudication.

(c) All references in 5 U.S.C. 7702 to 5 U.S.C. 7701 are modified to read 5 CFR part 9901, subpart H.

### § 9901.810 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.